Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

RAYMOND SANDATE,
SCOTT FRAZIER COEN, aka
WILLIAM SCOTT HOLDEN, and
ROBERT JACQUET,

PETITIONERS,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Application of Petite Policy to Federal Prosecution Instituted to Preserve the Integrity of a Prior State Conviction Based on the Same Transaction

1. Whether the United States violated the Petite policy when it approved and instituted a federal prosecution, based on the identical transaction which formed the basis of a prior state conviction, in order to insure the

integrity of the state conviction against possible collateral attack.

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REFERENCE TO OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, appears as United States v. Raymond Sandate, ____ F.2d ____ (1980) (slip opinion no. 79-3952).

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Fifth Circuit entered its opinion on November 12, 1980. A copy of the opinion is attached and marked as Appendix "A".

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 United States Code Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On January 29, 1979, Petitioners were arrested in the vicinity of Shreveport, Louisiana, by members of the Drug Enforcement Administration, Louisiana State Police and De Soto Parish Sheriff's Deputies. Petitioners Jacquet and Sandate were arrested on an airstrip in Mansfield, Louisiana in close proximity to a vehicle loaded with boxes containing marijuana. Petitioner Coen was arrested at Shreveport Downtown Airport minutes later. Prosecution of the Petitioners was conducted by the State of Louisiana, De Soto Parish.

On March 23, 1979, the Petitioners tendered guilty pleas in the Eleventh Judicial District Court, State of Louisiana, Parish of De Soto. At the time of the plea, the State of Louisiana dismissed all marijuana charges against the Petitioners and, pursuant to a plea agreement, filed a Bill of Information charging possession of codeine in violation of Louisiana Revised Statutes

Title 40, Section 964, Schedule II of Division (A), sub-paragraph (h), and Louisiana Revised Statutes Title 40, Section 967(c). At the time of the entry of the plea the District Attorney told the Court that a "plea bargain" had been struck "advantageous" to the State and "in the best interest of justice." The District Attorney, upon request of the Court, provided the factual basis for the guilty plea, indicating that the Petitioners had been found in possession of "substances" unlawful to possess under Louisiana law. The Court found "that there is a factual basis for the plea of guilty" and accepted the pleas. The Court imposed the maximum period of probation, five (5) years, on all three (3) Petitioners.

Shortly thereafter, an Assistant United States Attorney for the Western District of Louisiana, A. M. Stroud, III, was watching the news on television and observed Assistant District Attorney Daniel Toups being interviewed. Mr. Stroud learned that the Petitioners' pleas to possession of codeine was the result

of a plea bargain, however there was no codeine seized from the Petitioners. Assistant United States Attorney Stroud believed the lack of codeine rendered the state plea proceedings null and void and subject to habeas corpus attack. Mr. Stroud believed a federal prosecution against the Petitioners should be instituted because the state case was not handled "properly" and was subject to habeas corpus attack at a later date.

Authorization to indict the Petitioners was sought from the United States Department of Justice and received pursuant to the provision of 9-2.142 of the United States Attorney's Manual in a letter dated June 14, 1979, signed by the Acting Chief, Narcotic and Dangerous Drug Section, Criminal Division of the Justice Department. The Petitioners were indicted by the Grand Jury for the Western District of Louisiana on June 19, 1979, and charged in a two-count indictment with conspiracy and possession of marijuana with intent to distribute in violation of

Title 21 U.S.C. Sections 841(a)(1) and 846.

Petitioners filed pre-trial motions to dismiss the federal indictment on grounds that their prosecution was in violation of the Double Jeopardy clause and Petite policy of the Justice Department. Said motions were denied in the United States District Court for the Western District of Louisiana at Shreveport. Trial in the District Court has been stayed pending appeal of the District Court ruling.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES SUPREME COURT SHOULD DECIDE WHETHER INSTITUTION OF A FEDERAL PROSECUTION TO INSURE THE INTEGRITY OF A STATE CONVICTION AGAINST POSSIBLE COLLATERAL ATTACK IS A VIOLATION OF THE PETITE POLICY AS ENFORCED BY THIS COURT IN RINALDI V. UNITED STATES.

The United States Court of Appeals for the Fifth Circuit, in its opinion, decided that "The prosecution of these appellants even after a state conviction is not barred by the Constitution or the Petite policy." (See Appendix "A"). However, the prosecution of these Petitioners, instituted to insure against possible future collateral attack against their state convictions, blatantly violates the spirit and purpose of the Justice Department's Petite[1/] policy and is contrary to the holding of this Court in Rinaldi v. United States, 434 U.S. 22, 98 S.Ct. 81 (1977).

The Petite policy was formulated by the

1/ See Petite v. United States, 361 U.S. 529, 80 S.Ct. 450 (1960).

Justice Department in direct response to this Court's opinions in Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676 (1959) and Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666 (1959), holding that the Constitution does not deny the State and Federal Governments the power to prosecute for the same act. These cases reflect the concern that if the Double Jeopardy Clause were applied when the sovereign with the greater interest is not the first to proceed, the administration of criminal justice may suffer. Mindful of the potential abuse in a rule permitting dual prosecutions, and in response to the Court's continuing sensitivity to the fairness implications of the multiple prosecution power, the Justice Department adopted the policy of refusing to bring a federal prosecution following a state prosecution except when necessary to advance "compelling interests" of federal law enforcement. This policy was formally defined by then Attorney General Rogers. This Executive Policy serves to protect interests which, but for

the "dual sovereignty" principle inherent in our federal system, would be embraced by the Double Jeopardy Clause. This policy is not only useful to the efficient management of limited executive resources but it "also serves the more important purpose of protecting the citizen from any unfairness that is associated with successive prosecutions based on the same conduct." Rinaldi, supra at 27.

This Court noted in Rinaldi that the benefit of the Petite policy should be received by a defendant only when its application is urged by the government. However, when the reasons urged by the federal government for the institution of its prosecution are not "compelling" and are in obvious violation of its own Petite policy, this Court should exercise its supervisory power to insure equal administration of the policy to all individuals. To do otherwise would render the Petite policy a mere procedural process totally

lacking any substantive content or guidelines.

The Assistant United States Attorney in this cause testified that in his opinion the entry of the plea by the Petitioners to possession of codeine, rather than marijuana, rendered their convictions null and void and open to subsequent habeas corpus attack. In essence, the lack of a factual basis for the entry of the Petitioners' pleas in State Court became the "compelling reason" for the institution of the federal prosecution. Despite the fact that the Petitioners' pleas were entered in open court, with the assistance of counsel, pursuant to a plea agreement and done knowingly and voluntarily, the United States Attorney's Office for the Western District of Louisiana felt further prosecution was necessary.[2/]

[2/] It is also noteworthy that Assistant United States Attorney Stroud testified that he was not dissatisfied with the sentence received by the Petitioners; it was his concern with the type of guilty plea entered and possible future proceedings attacking the pleas.

To allow prosecution of the Petitioners in Federal Court at this point in time, based upon the belief that their State guilty pleas may be subject to future collateral attack, would open the doors to chaos and uncertainty throughout the jurisdictions of this country. It is certainly no secret that plea bargaining is necessary for the effective and efficient administration of justice in this country, in both State and Federal jurisdictions. It is also no secret that to arrive at plea agreements it is frequently necessary for some degree of latitude to be allowed with respect to the plea agreement. To allow the federal government to look over the shoulders of local District Attorneys and defense counsel and determine whether the plea agreements are "just" and/or open to collateral attack would have a chilling effect on plea bargaining at the state and local levels.

Additionally, to allow this federal prosecution would allow the Justice

Department to depart from the Petite policy. In Rinaldi, supra, at 30 f.n. 16, it is noted:

> ". . . the Government attorney apparently contended it would be proper to continue a federal prosecution until the integrity of a prior state conviction was assured and then to seek dismissal of the federal charges. If counsel's argument represented the position of the United States, it would indeed mark a departure from the Petite policy. But we are persuaded that counsel's over zealous attempt to rationalize the prior conduct of the prosecution did not signal a new Executive policy on multiple prosecutions. The Solicitor General unequivocally states that the government has strictly adhered to the Petite policy since its announcement in 1959."

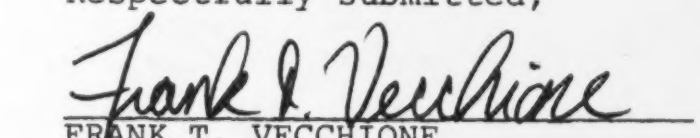
The prosecution in this cause certainly marks a departure from strict adherence to the Petite policy. This Court should exercise its supervisory power to maintain the integrity of the Petite policy and to insure its uniform application.

CONCLUSION

For the foregoing reasons, Petitioners Raymond Sandate, Scott Frazier Coen, aka William Scott Holden, and Robert Jacquet, respectfully request that a Writ of Certiorari issue to review the affirmance of the denial of Petitioners' pre-trial motion to dismiss the indictment.

DATED: January 8, 1981

Respectfully submitted,



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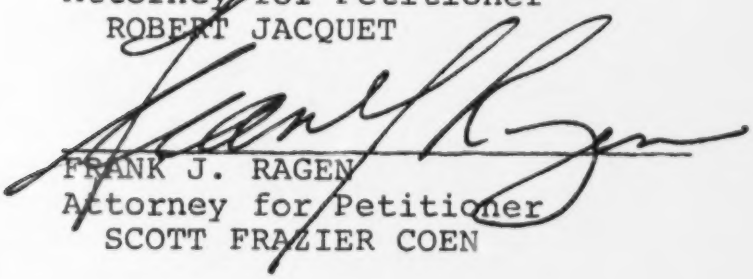

FRANK J. RAGEN
Attorney for Petitioner
SCOTT FRAZIER COEN

PROOF OF SERVICE

I, Frank T. Vecchione, hereby declare:

I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within action.

My business address is 108 Ivy Street, San Diego, California.

On January 9, 1981, I placed in an envelope with postage prepaid, a copy of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washington, D.C. 20430

I declare under the penalty of perjury that the foregoing is true and correct. Executed on this 9th day of January, 1981, at San Diego, California.

Frank T. Vecchione

FRANK T. VECCHIONE

UNITED STATES of America,
Plaintiff-Appellee,

v.

Raymond SANDATE, Scott Frazier Coen,
aka William Scott Holden, Robert Jacquet,
Defendants-Appellants.

No. 79-3952

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

Nov. 12, 1980.

Appeal from the United States District Court
for the Western District of Louisiana.

Before AINSWORTH, GARZA and
SAM D. JOHNSON, Circuit Judges.

GARZA, Circuit Judge:

This case is before us on an appeal from a denial of a motion to dismiss an indictment on double jeopardy grounds.

On January 29, 1979, the appellants were arrested by federal and state authorities while unloading four hundred (400) pounds of marihuana from an airplane into a truck. The appellants were charged in state court

with possession of marihuana, but pursuant to a plea bargain agreement, they pled guilty to possession of codeine and each was sentenced to five (5) years probation.

On June 19, 1979, the appellants were indicted on federal charges of conspiracy and possession with intent to distribute four hundred (400) pounds of marihuana in violation of 21 U.S.C. § 841(a)(1) and 846. The appellants filed a motion to dismiss on double jeopardy grounds arguing that their state guilty pleas were tendered only after assurances by the federal government that there would be no federal prosecution. The district judge held an evidentiary hearing on November 26, 1979, and denied the motion to dismiss the indictment.

At the evidentiary hearing, the three attorneys who represented the appellants in state court testified as well as the U.S. Attorneys who had been involved in the case. Defense counsel testified that when they conferred with their clients,

they were told that a plea bargain had been reached with the state under which they would plead guilty to possession of codeine. Counsel decided to determine if federal charges would be filed. In counsel's presence, the Assistant District Attorney for the state, one Toups, telephoned the United States Marshal, who stated that there were no outstanding warrants for the appellants. Toups also telephoned the Assistant U.S. Attorneys to discuss the matter, with the appellants' counsel present and able to hear only Toups' side of the conversation. From what they heard, they believed that the federal authorities did not intend to prosecute the appellants if they pled guilty to a narcotics violation. One attorney recollected that Toups had told the Assistant U.S. Attorney that he was speaking so that the pleas would be to possession of codeine and that the appellants would be placed on probation. The other two attorneys, however, recollected otherwise - that the charge that the

appellants were pleading guilty to in the state court was not specified. Based upon their belief that there would be no federal prosecution, the appellants pled guilty.

Assistant U.S. Attorney Stroud testified that he received a call from an attorney concerning this case. He testified that he was asked if there were pending charges or if federal authorities intended to get involved and that he replied that it was normal practice not to prosecute if the state handled the narcotics case. Later on he learned that the pleas that the appellants had entered in State Court were to possession of codeine and that there was no codeine involved. From other testimony received at the evidentiary hearing, it was made abundantly clear that no codeine was in the possession of the defendants when they were arrested. Assistant U.S. Attorney Stroud testified that because there was no codeine in their possession, he felt that the guilty pleas were invalid and that the

conviction was susceptible to a collateral attack, and that the state had not properly prosecuted the appellants. He further testified that he had obtained permission from the Justice Department to prosecute them before the present indictment was returned.

The Court below denied the motion to dismiss finding that the government was not a participant in the state plea bargain and did not make binding representations to Toups. The Court below stayed further proceedings pending this appeal.

The findings of the Court below are amply supported by the evidence before him and they are not clearly erroneous.

The appellants' main argument is that the Supreme Court has denounced dual prosecutions where a federal conviction is sought as insurance should the state conviction be later invalidated, citing Rinaldi v. United States, 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed. 207 (1977). In that case,

the Supreme Court ruled that the district court should have granted the government's post-conviction motion to dismiss the indictment on grounds that the Justice Department's Petite [, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490] policy had been violated. The Petite policy, established by the Department of Justice, bars a federal trial following a state prosecution for the same act "unless the reasons are compelling." Id. 434 U.S. at 24 n.5, 98 S.Ct. at 82 n.5. In the Rinaldi case the prosecution had been pursued despite the failure of government counsel to obtain Department permission which is a violation of the Petite policy procedures. Since the government's purpose in seeking dismissal was not motivated by considerations "clearly contrary to manifest public interest," but to correct an unfairness, the Court held that the district court erred in not dismissing the indictment.

[1] In the case before us, the Petite policy procedures were not violated, as Assistant U.S. Attorney Stroud received permission from the Department to pursue this prosecution. The Court has held that a defendant may not use the Petite policy to invalidate an otherwise legitimate indictment. United States v. Hayes, 589 F.2d 811, 818 (5th Cir. 1979), cert. denied, 444 U.S. 847, 100 S.Ct. 93, 62 L.Ed.2d 60. The prosecution of these appellants even after a state conviction is not barred by the Constitution or the Petite policy.

[2] Appellants also argue that the government's participation in the state prosecution and plea bargaining precludes federal prosecution. This contention is without merit and is not supported by the record. While both federal and state authorities participated in the arrest, the federal investigation proceeded independently. A Drug Enforcement agent

was present as an observer at the guilty pleas in the state court but did not participate in any way during the state proceedings. The testimony failed to show that the government participated in the plea bargaining or made a firm commitment not to prosecute. The denial of the motion to dismiss the indictment on double jeopardy grounds was correct and such denial must be

AFFIRMED.